VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF NORTHAMPTON

MORRIS ODELL MASON, :

Petitioner, :

v. :

EDWARD C. MORRIS :
Superintendent
Mecklenburg Correctional Center, :

Respondent. :

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a bifurcated bench trial, Morris Odell Mason, who pleaded guilty to capital murder, was convicted by this court of wilful, deliberate and premeditated murder during the commission of or following rape pursuant to Code of Virginia (1950), as amended, Section 18.2-31(e) and after a penalty hearing his punishment was fixed at death. After a post-conviction sentencing hearing at which the court received the report of a probation officer, the court confirmed the penalty fixed at the earlier penalty hearing and sentenced defendant to be executed in accordance with Virginia Code Section 19.2-264.5. Mason came before the Supreme Court of Virginia for an automatic review of his death sentence which court on April 20, 1979 upheld the decision of the trial court. Mason v. Commonwealth, 219 Va. 1091. On October 15, 1979, the Supreme Court of the United States denied Mason's petition for a writ of certiorari.

On January 2, 1980, Mason filed a petition for a writ of habeas corpus attacking his conviction and death sentence imposed by this court. On January 15, 1980, this court ordered a plenary hearing on the petition for a writ of habeas corpus and stayed petitioner's execution which was set for January 22, 1980. At the same time, the court ordered that there be a pre-trial hearing to sort out the issues to be addressed at the plenary hearing. The pre-trial hearing was held on February 28, 1980 and on April 14, 1980, the court entered an order granting a hearing on Count IV of the petition for a writ of habeas corpus and denying a hearing as to Counts I, II, III, V, VI, VII, VIII and IX.

Count One of the petition for a writ of habeas corpus alleges that the Virginia capital sentencing procedure is unconstitutional on its face and as applied under the Eighth and Fourteenth amendments to the Constitution of the United States and under Article One, Section Nine of the Constitution of Virginia.

This court ruled at the pre-trial hearing that this issue was raised on appeal to the Supreme Court of Virginia and was decided adversely to the petitioner. Mason v. Commonwealth, 219 Va. 1091.

Count Two of the petition alleges that the capital sentencing procedure of Virginia has resulted in arbitrary and discriminatory application of the death penalty based on the race, gender and financial status of the offender and the victim and that petitioner's death sentence was imposed pursuant to this discriminatory pattern and practice in violation of the Eighth and Fourteenth amendments to the Constitution of the United States and Article One, Section Eleven of the Constitution of the Commonwealth of Virginia.

This court ruled at the pre-trial hearing that this issue was not raised during the trial of petitioner nor was it raised on appeal to the Supreme Court of Virginia and that a petitioner for a writ of habeas corpus has no standing to raise such an issue in his petition for the first time. The Supreme Court of Virginia in the case of Ferguson v. Penitentiary Superintendent, 215 Va. 269 said as follows:

> "All the issues raised by the petitioner, Ferguson, in his petition for a writ of habeas corpus, or set forth in his assignments of error, could have been raised and adjudicated in the trial court and upon direct appeal to this court. He failed to do this, and therefore lacks standing to raise the issues on habeas corpus."

Count three alleges that the trial court's refusal to allow funds for an independent psychiatrist to examine petitioner and petitioner's trial counsel deprived petitioner of adequate and effective assistance of counsel in violation of the Sixth and

Fourteenth Amendments to the Constitution of the United States and Article One, Sections Eight and Eleven of the Constitution of Virginia.

Once again, this court ruled at the pre-trial hearing that this issue was raised on appeal to the Supreme Court of Virginia and decided adversely to the petitioner. In the case of Mason v. Commonwealth, 219 Va. 1091, the Virginia Supreme Court stated as follows in quoting from the case of Houghtaling v. Commonwealth, 209 Va. 309, cert. denied, 394 U. S. 1021:

> "The precise point in issue, arising under similar circumstances, was before the United States Supreme Court in United States v. Baldi, 344, U. S. 561, 73 S.Ct. 391, 97 L.Ed. 549, 556 (1953). There, the defendant contended that 'the assistance of a psychiatrist was necessary to afford him adequate counsel' and that 'he should have been given technical pretrial assistance by the State.' The court said, 'We cannot say that the State has that duty by constitutional mandate.' That holding is applicable to and dispositive of the question before us."

Count IV of the petition alleges that the petitioner's attorneys failed to provide representation within the range of competence demanded of attorneys in criminal cases and petitioner was therefore denied adequate and effective assistance of counsel.

This court granted a plenary hearing on this issue which was conducted on April 25, 1980 and will be discussed later in much greater detail.

Count Five of the petition alleges that in light of petitioner's history of mental disorder, and the circumstances of the offenses occurring between May 2, 1978 and May 14, 1978, the court's failure to order a psychiatric evaluation, sua sponte, as authorized by law under Section 19.2-300, inter alia, to assist the court to determine the presence of mitigating mental abnormality as defined in Va. Code Section 19.2-264.4(b) and to determine, according to Section 19.2-264.5, whether a sentence of death would be appropriate constituted an abuse of the discretion afforded the Court under those statutes, and denied Petitioner Due Process of Law in violation of the Fourteenth Amendment to the Constitution of the United States and Article One, Sections Eight and Eleven of the Constitution of Virginia.

This court ruled at the pre-trial hearing that since this issue was not raised during the trial nor on appeal to the Supreme Court of Virginia, it could not be raised for the first time in a petition for a writ of habeas corpus.

Also, as to claim of petitioner that the Trial Judge should have ordered the psychiatric evaluation, sua sponte, pursuant to Section 19.2-300 and other sections, Section 19.2-301 states that the examination provided for in Section 19.2-300 may be dispensed with if "a prior report on such person has been submitted to the court by the Department during the proceedings, to be made by a psychiatrist employed in any State hospital or in any mental hospital maintained by the State."

On page 1096 of the case of Mason v. Commonwealth, 219 Va. 1091 it is reported as follows:

> "At his counsel's request prior to his preliminary hearing on this and other pending charges, Mason received two separate psychiatric examinations, one by W. A. Dretzgen, M.D., at the Eastern Shore Mental Health Center, and the other by the psychiatric staff at Central State Hospital."

Count Six of the petition states that the circumstances of petitioner's trial were, in their totality, so unfair and prejudicial that the imposition of the capital sentence would deprive him of his life without Due Process of Law in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article One, Sections Eight and Eleven of the Constitution of Virginia.

Once again, this court ruled at the pre-trial hearing that since this issue was not raised at trial nor on appeal to the Supreme Court of Virginia, it could not be raised for the first time in a petition for a writ of habeas corpus.

Count Seven of the petition states that imposition of the death penalty is unnecessarily cruel and is forbidden by the Eighth and Fourteenth Amendments to the Constitution of the United States.

Once again, this court ruled at the pre-trial hearing that this matter was not raised at trial nor on appeal.

In addition, the case of Spinkellink v. Wainwright, 578 F.2d 582 (1978) at page 616 holds that such a contention is without merit. It states as follows:

> "The petitioner's fifth contention is that electrocution, which is Florida's method of carrying out a sentence of capital punishment is unnecessarily tortuous and wantonly cruel and therefore constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The Supreme Court has previously considered this assertion in In re Kemmler, 136 U.S. 436, 10 S.Ct., 930 where the Court held that a New York statute providing for electrocution as the method of carrying out a sentence of capital punishment was constitutional."

The Eighth Count alleges that because petitioner is only the third person sentenced to death under Virginia Code, Sections 19.2-264.2, et seq., execution of the death sentence in his case at the present time would be inconsistent with the General Assembly's directive that the death penalty not be imposed when the sentence of death is excessive or disproportionate to the penalty imposed in similar cases.

This court dismissed that count at the pre-trial hearing because the Supreme Court of Virginia had addressed that question on appeal and ruled adversely to the petitioner. See Mason v. Commonwealth, 219 Va. 1091 at page 1100 wherein the Supreme Court of Virginia stated as follows:

> "Neither do we believe that the sentence imposed on Mason was excessive and disproportionate to the penalty imposed in similar cases. When the evidence here is compared with that in Smith and Wave, supra, the only other cases revieved by this court under the revised death penalty statutes, it discloses aggravating circumstances here which equal or exceed the aggravating factors found in each of those cases."

Count IX of the petition states that counsel, although they were in possession of evidence from which they knew, or should have known, that the corpus delicti of rape, and therefore of capital murder, could not be proved without petitioner's confession, counsel failed to tell petitioner of this defense and recommended that petitioner plead guilty and that petitioner was therefore denied adequate and effective assistance of counsel.

Although Count Nine was denied by order of April 14, 1980 which carried out the rulings of the court at the pre-trial hearing held on February 28, 1980, this count was considered at the plenary hearing held on April 25, 1980 due to the fact that it was also raised under Count Four. Count Nine will also be explored later in greater detail.

When referring to the transcripts of the various hearings and trials, the Court, when referring to the plenary hearing conducted on April 25, 1980, will use (P.H.---) and when referring to trial transcripts it will designate by the letter "T", date and page (T. date, page).

By order of December 8, 1980, this court ruled that the standard to be applied in determining competency of counsel is whether counsel's performance was within the range of competence demanded of attorneys in criminal cases and that petitioner bears the burden of establishing his claim of ineffective assistance of counsel by a preponderance of the evidence and that petitioner must establish prejudice from any act or omission of counsel.

Petitioner contends that a greater standard of competency is demanded of attorneys in capital cases than in other criminal cases. This court does not agree. Although it is apparent that death, by whatever means, is final insofar as earthly existence is concerned, it is also apparent that life imprisonment or imprisonment for a term of years is very devastating and this court does not agree that there is a greater standard of competency required for the handling of a capital case as opposed to other criminal cases.

Among other cases, petitioner has cited Cooper v. Fitzharris, 551, F.2d. 1162 (9th Cir. 1977). He cited this case in oral argument before this court on October 16, 1980 and again in his "Memorandum of Law" filed on November 26, 1980. However, that was a panel opinion which was overruled by the Ninth Circuit Court of Appeals sitting en banc. See Cooper v. Fitzharris, 586 F.2d 1325 (1978) at page 1327 wherein the court ruled that where the claim of ineffective assistance of counsel is founded upon specific acts and omission of defense counsel at trial, the accused must

show that counsel's errors prejudiced the defense. This court is of the opinion that it ruled correctly by its order of December 8, 1980 which stated that "petitioner bears the burden of establishin his claim of ineffective assistance of counsel by a preponderance of the evidence, and that petitioner must establish prejudice from any act or omission of counsel."

The court is further of the opinion that it ruled correctly in the same order that "the standard to be applied in determining competency of counsel is whether counsel's performance was within the range of competence demanded of attorneys in criminal cases."

Since it goes directly to the question of whether or not there was an actual capital case, the court will consider first the contention that counsel was ineffective in not properly advising petitioner in regard to the legal principle that there must be corroborating evidence of a crime before a person may be convicted on the basis of a confession and after exploring that, it will address the allegation of ineffectiveness due to failure of counsel to explore, develop and present available evidence of mitigating mental abnormality.

Mr. H. P. Custis, Jr., one of the trial counsel, testified that he and Mr. R. B. Phillips, the other trial counsel, had both advised petitioner not to plead guilty and that he had rejected their advice. (P.H. p. 48).

They felt that considering the circumstances, a capital crime, the severity of the penalty, that they would have been better off before a jury because of the possibility of "persuading one person on that jury versus one before His Honor." (P.H. p.48). Both of them testified that they had explained to their client that he could not be convicted upon an uncorroborated confession. (P.H. pp. 62, 138). In spite of that advice, petitioner persisted that he enter a plea of guilty. This evidence was elicited at the plenary hearing before this court on April 25, 1980 and was not contradicted by anyone. There seems to be no question that both trial counsel thoroughly understood the law in regard to an uncorroborated confession, that they advised their client in this regard and that he rejected their advice.

Cases hold that where there is a confession, all that is required is slight evidence to establish the corpus delicti. Campbell v. Commonwealth, 194 Va. 825 and Lucas v. Commonwealth, 201 Va. 599. Also, the corpus delicti may be established by circumstantial as well as direct evidence. Cochran v. Commonwealth, 122 Va. 801 and Lane v. Commonwealth, 219 Va. 509. The transcripts of the trial of the case at bar are replete with circumstantial evidence to justify a conviction of wilful, deliberate and premeditated murder during the commission of or following rape.

Let us now discuss the question which this court considers to be the most important aspect of the case, i.e., whether or not trial counsel were ineffective in not exploring, developing, and presenting available evidence of mitigating mental abnormality pursuant to Section 19.2-264.4 of the Code of Virginia.

Trial counsel in this case were presented with a most difficult situation. Mr. Custis testified at the plenary hearing in answer to a question as to whether or not he had ever asked Dr. Dimitris or anyone on the staff of Central State Hospital as to whether or not they had an opinion in regard to mitigating mental abnormalities that he had not asked them. (P.H. p.45). His complete answer was: "No, sir. In view of the record that we had before us at that time, knowing the statements which had been made and our discussions with Mr. Mason and also the two responses to the commitment order of May 26th or 27th -- whatever it was -- from Doctor Dimitris, we did not think that Central State or Doctor Dimitris or anyone on that staff in view of that with no additional evidence other than the statements -- that they could be beneficial to us." (P.H. p.45). With this in mind, they tried to attack the problem in another manner. They talked to petitioner's girlfriend and his mother. "We tried to formulate or find out if in fact he had any drugs, where he got them, what they were, when he got them; but we were unable to." (P.H. p.70).

They said that petitioner did not furnish them the names of anyone who could indicate that he had drugs or alcohol. (P.H. p. 70). They discussed the portion of the statute with petitioner which dealt with the mitigating mental abnormalities and they tried to elicit his testimony. He refused. They tried to elicit testimony from family members to no avail. (P.H. p. 82). All they had were the various reports from the various hospitals, including Central State, so these were presented to the Court. (T. 9/29/78 pp. 18-22).

Trial counsel also explained that they did not subpoena any of the psychiatrists. When asked why, Mr. Custis replied: "We had the reports and we had the summaries, and there was no prior history other than what Doctor Dimitris explained as to his condition I think in Pennsylvania. We were aware of what were contained in those reports but did not think that the doctor's presence would have been beneficial." (P.H. pp. 71, 72). They were also cognizant of the fact that if the doctors were present, they would have been subject to cross-examination. (P.H. p. 72). They were of the opinion that without some additional evidence, which they tried to get but were unsuccessful, that neither Dr. Dimitris or any other doctor would be helpful in light of the statements made by petitioner, their discussions with him and the psychiatric reports. (P.H. pp. 45,77). "It's a judgment call at the time, and that's what we did." (P.H. p. 77).

On July 14, 1980, Dr. Dimitris submitted a report to this court after his examination of petitioner pursuant to order entered on May 14, 1980. The purpose of the examination was to determine whether at the time of the capital offense committed on May 13, 1978, the petitioner was under the influence of extreme mental or emotional disturbance or whether his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired. The essence of his opinion was that if the statements given to Investigator K. E. Collins by petitioner as testified to by Officer Collins on September 28, 1978, specifically from pages 51-70 on (T. 9/28/78 pp. 51 through 70) are the facts of the case, then there are no mitigating abnormalities. However, if the facts are as presented

by petitioner during his examination at Central State Hospital on June 3, 5, and 11, 1980, then he was unable to formulate an intent, deliberate, premeditate and act with malice, because of reported heavy intoxication.

This court has made a careful study of the record in this case. It is very significant that petitioner gave statements to several different people after the commission of the crime describing his participation therein and all of these statements were essentially the same as that given to Investigator K. E. Collins as testified to by him on September 28, 1978 to which Dr. Dimitris referred in his report and opinion of July 14, 1980. In addition, the physical evidence found at the scene of the crime certainly is in accord with the statements.

When petitioner went to Central State Hospital to be examined pursuant to order of this Court entered on May 14, 1980, he was well aware that he had been convicted of a capital crime and sentenced to die.

The Court is of the opinion that petitioner has not carried the burden of establishing prejudice as a result of any omission of trial counsel and is of the opinion and concludes that for each claim of ineffective assistance of counsel raised herein, petitioner was afforded counsel who were competent, diligent, thorough, and ably represented petitioner within the range of competence demanded of attorneys in criminal cases. The Court is further of the opinion that even though several counts of the Petition for Habeas Corpus were dismissed because they were not raised during trial or on appeal, that had they been raised, there is no merit to these contentions and would have been decided adversely to petitioner. Petitioner's request for habeas corpus relief is hereby denied. The Office of the Attorney General shall prepare an order in accordance with these Findings of Fact and Conclusions of Law. Copies of this document have this day been mailed to petitioner and counsel. Petitioner is notified herewith of his right to appeal.

Philip L. Russo, Judge

March 17, 1981
(Date)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 20th *day of* April, 1982.

Morris Odell Mason, Appellant,

against Record No. 811168

Edward C. Morris, Superintendent of the Mecklenburg Correctional Center, Appellee.

From the Circuit Court of Northampton County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

The said circuit court shall allow court-appointed counsel the total fee set forth below and also their necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorneys' fee	$400.00	plus their costs and expenses
Filing fee	25.00	

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

VIRGINIA

IN THE CIRCUIT COURT FOR THE COUNTY OF NORTHAMPTON

MORRIS ODELL MASON,

Petitioner

v.

EDWARD C. MORRIS, Superintendent,
Mecklenburg Correctional Center

Respondent

FINAL ORDER

On April 25, 1980, came Morris Odell Mason, the petitioner in person and by John C. Lowe, Richard J. Bonnie, J. Lloyd Snook, III, and John W. Drescher, his attorneys, and came also the Respondent by James E. Kulp, Deputy Attorney General, to be heard upon the Petition for a Writ of Habeas Corpus, upon pleadings duly received and filed and orders heretofore entered.

After hearing evidence and upon motion of the parties the Court on May 14, 1980, ordered the petitioner to be examined by Dr. James C. Dimitris and the staff of Central State Hospital and a report of this examination having been filed with the Court; and upon consideration of the evidence, argument of counsel and the memorandums of law, the Court finds and is of the opinion that the prayers of the petition should be denied and the petition dismissed for the reasons set forth in its findings of fact and conclusions of law dated March 17, 1981, which are hereby incorporated and made a part of this order as if set out in full herein.

Now, therefore, for the reasons set forth, the Court ADJUDGES, ORDERS, and DECREES that the prayers of the Petition for a Writ of Habeas Corpus be denied and the petition

dismissed, the writ discharged and the petitioner remanded to the custody of the Respondent.

It is further ORDERED that the petitioner's stay of execution be continued in effect until the resolution of his appeal to the Virginia Supreme Court, ~~and for a reasonable time thereafter~~.

The Clerk is directed to certify copies of this order to the petitioner, the Respondent, John C. Lowe, Esquire, and James E. Kulp, Deputy Attorney General.

ENTER this 15th day of April, 1982.

P. L. Russo
JUDGE

I ask for this:

James E. Kulp
Counsel for Respondent

Seen and objected to:

J. Lloyd Snook III
Counsel for Petitioner

A Copy:

Teste: Clyde E. Hibb, Clerk

No. 82-5093

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MORRIS ODELL MASON,

Petitioner

v.

EDWARD C. MORRIS,

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Morris Odell Mason, by his counsel, moves this Court to grant him leave to proceed in forma pauperis with respect to his Petition for Writ of Certiorari to the Supreme Court of Virginia, which Petition for Writ of Certiorari is filed contemporaneously herewith, representing unto the Court as follows:

1. Petitioner is unable to pay fees, costs or security for the Petition for Writ of Certiorari filed on Petitioner's behalf.

2. The nature of the Petition for Writ of Certiorari is to seek review of the judgment entered by the Supreme Court of Virginia affirming the imposition of the sentence of death upon your Petitioner for capital murder. Appellant was convicted under Va. Code Ann. §18.2-31(1977 Cum. Supp.). He contends in his Petition for Writ of Certiorari that he was denied the effective assistance of counsel, guaranteed him under the Sixth and Fourteenth Amendments to the United States Constitution.

3. Appellant is filing the affidavit required by 28 U.S.C. §1915 contemporaneous with the filing of this application.

LAW OFFICES
LOWE, GORDON,
JACOBS & SNOOK, LTD.
CHARLOTTESVILLE, VA.
(804) 296-8188

Morris Odell Mason

By Counsel

John C. Lowe
F. Guthrie Gordon, III
Lowe, Gordon, Jacobs & Snook, Ltd.
409 Park Street
Charlottesville, Virginia 22901

MAILING CERTIFICATE

I, F. Guthrie Gordon, III, a member of the Bar of this Court, make oath that, on or before July, 19, 1982, I caused this Motion for Leave to Proceed In Forma Pauperis, with the supporting affidavit, to be deposited in a United States Post Office or mailbox, with First-Class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2. I further make oath that I caused on copy of each of the above-mentioned documents to be sent to James E. Kulp, 101 North Eighth Street, Richmond, Virginia, 23219, by deposit in the United States Post Office mailbox, with First-Class postage prepaid.

F. Guthrie Gordon, III

NOTARIAL CERTIFICATE

Sworn, subscribed and acknowledged before me this 19th day of July, 1982, by F. Guthrie Gordon, III.

Notary Public

My commission expires: June 18, 1984

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 82-5093

MORRIS ODELL MASON,

Petitioner

v.

EDWARD C. MORRIS,

Respondent

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Morris Odell Mason, having been duly sworn, do depose and say that:

1. I am the Petitioner in the above-styled cause;

2. That I am indigent and unable to pay the fees and costs, or to give security for the fees and costs, associated with the prosecution of the attached Petition for Writ of Certiorari to the Supreme Court of Virginia;

3. That I was certified as an indigent at trial, and was appointed an attorney at that time;

4. That I pursued an appeal to the Supreme Court of Virginia as an indigent with court-appointed counsel, pursuant to the Rules of the Supreme Court of Virginia, and that I pursued my Petition for Writ of Certiorari in forma pauperis;

5. That I brought the Petition for Writ of Habeas Corpus in the Circuit Court for the County of Northampton, in forma pauperis, and that I pursued my appeal in the Supreme Court of Virginia from the denial of that Petition with court-appointed counsel;

6. That I have been incarcerated since my arrest on this charge four years ago;

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7. That I am not presently employed, and have not been employed since before my arrest four years ago;

8. That I have not received income from any other source in the last twelve months, and that I have no cash, bank accounts, or valuable property.

WHEREFORE, I respectfully pray this Court, pursuant to the attached Application to Proceed In Forma Pauperis, to allow me to file the attached Petition for Writ of Certiorari in forma pauperis.

Morris Odell Mason
Morris Odell Mason

NOTARIAL CERTIFICATE

STATE OF VIRGINIA

COUNTY OF MECKLENBURG, to-wit:

Subscribed, sworn and acknowledged before me this 18 day of June, 1982, by Morris Odell Mason.

Notary Public

My commission expires: June 15, 1985

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